No. 97-9361

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

LOUIS JONES, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(CAPITAL CASE)

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

SEAN CONNELLY
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a jury instruction that the jury's failure to agree on a sentencing recommendation automatically would result in a court-imposed sentence of life imprisonment without possibility of release.

2. Whether there is a reasonable likelihood that the jury instructions led the jury to believe that deadlock on the penalty recommendation would automatically result in a court-imposed sentence less severe than life imprisonment.

3. Whether the court of appeals correctly held that the submission of invalid non-statutory aggravating factors was harmless beyond a reasonable doubt.

4. Whether the court of appeals complied with statutory requirements to "address" all of petitioner's claims and to "state in writing" the reasons for its disposition of the appeal.

STATEMENT

After a jury trial in the Northern District of Texas, petitioner was convicted of the capital offense of kidnapping with death resulting to the victim, in violation of 18 U.S.C. 1201, and of the non-capital offense of assaulting a different victim, in violation of 18 U.S.C. 113. After a separate sentencing hearing, the jury recommended that petitioner be sentenced to death for the capital offense. Pet. App. A8. The district court sentenced petitioner to death on the capital count and to 57 months' imprisonment on the non-capital count. Pet. 3. The court of appeals affirmed. Pet. App. A1-A25.

1. The trial evidence showed that petitioner kidnapped and brutally killed Tracie Joy McBride, a 19-year old private who was stationed at Goodfellow Air Force Base in San Angelo, Texas. On February 18, 1995, petitioner abducted McBride from the base at gunpoint. In the process, petitioner assaulted and severely injured Private Michael Peacock. On March 1, 1995, petitioner was arrested for a separate crime: the abduction and sexual assault of his ex-wife Sandra Lane, which had occurred two days before the McBride kidnapping. Petitioner, who by then was considered a possible suspect in the McBride case, waived his Miranda rights and confessed that he kidnapped and murdered McBride. Pet. App. A6.

In his written statement, petitioner admitted that he abducted McBride and brought her back to his apartment, where he tied her up and put her in the closet. Petitioner also admitted that he drove McBride to a remote location, where he repeatedly struck her over

the head with a tire iron until she died. Petitioner was unable to describe the location but he led investigators to a bridge, located 20 miles outside San Angelo, Texas, under which they found McBride's dead body. An autopsy revealed that she had died from blunt force trauma to the head and that she had been assaulted sexually. Pet. App. A6-A7.

2. A special jury sentencing hearing was held, pursuant to 18 U.S.C. 3593, on the capital count. The jury, as required by statute, considered: (1) whether petitioner intended to kill McBride or acted with some other degree of scienter sufficient to support the death penalty, see 18 U.S.C. 3591(a); (2) whether the prosecution proved beyond a reasonable doubt the statutory aggravating factors and non-statutory aggravating factors that it had alleged, 18 U.S.C. 3593(c); (3) whether the defense proved any mitigating factors by a preponderance of the evidence, ibid.; and 4) whether the aggravating factors "sufficiently outweigh[ed]" any mitigating factors in order to justify a sentence of death, 18 U.S.C. 3593(e). Pet. App. A7-A8.

The jury found, beyond a reasonable doubt, that petitioner intentionally killed McBride and also that he intentionally inflicted serious bodily injury that resulted in her death. Pet. App. A7. The jury next found beyond a reasonable doubt two of the four statutory aggravating factors alleged by the prosection: that petitioner caused the death during commission of kidnapping, another crime, and that petitioner committed the offense in an especially heinous, cruel, and depraved manner. See 18 U.S.C.

3592(c)(1) & (6); Pet. App. A8. The jury also found beyond a reasonable doubt two of the three non-statutory aggravating factors: McBride's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; and McBride's "personal characteristics and the effect of the offense on her family." The jurors individually decided whether any mitigating factors, including the 11 factors proposed by the defense, existed. One or more jurors found the existence of ten of the 11 proposed factors, and seven jurors found the existence of an additional mitigating factor. Finally, the jury weighed the aggravating factors against the mitigating factors. Pet. App. A8.

After making the findings required by statute, the jury unanimously recommended that petitioner be sentenced to death. Pet. App. A8. The district court followed that recommendation and imposed a death sentence on the capital count. See 18 U.S.C. 3594.

3. The court of appeals affirmed. Pet. App. A1-A25. The court upheld the constitutionality of the Federal Death Penalty Act, 18 U.S.C. 3591-3598, and, in so doing, rejected several arguments that petitioner does not renew before this Court. See id. at A8-A12.

a. The court of appeals next rejected several challenges by petitioner to the jury instructions. First, the appeals court rejected petitioner's contention that the trial court erred by not instructing the jury that its failure to reach a unanimous recommendation on the death penalty would result in the court automatically imposing a life sentence without possibility of

release. See Pet. App. A13 & n.8. The court of appeals explained that the instructions proposed by petitioner were legally incorrect: "Life without the possibility of release was not the default penalty in the event of non-unanimity. On the contrary, the failure to reach a unanimous decision regarding sentencing would result in a hung jury with no verdict rendered." Id. at A13.

The court distinguished a Louisiana Supreme Court decision holding that juries must be informed of the consequences of deadlock, because, unlike the federal death penalty provisions, "the Louisiana death penalty act * * * expressly provided that life imprisonment resulted when the jury could not unanimously agree on the death penalty." Id. at A16 (citing State v. Williams, 392 So.2d 619 (La. 1980)). The court explained that, in contrast to the Louisiana rule, "federal courts have never been affirmatively required to give such instructions." Ibid. The court therefore held that "no constitutional violation occurs when a district court refuses to inform the jury of the consequences of failing to reach a unanimous verdict." Ibid.

b. The court also declined to reverse petitioner's sentence based on his challenges to instructions, to which he did not object in the trial court, that suggested that there was a possibility that the court could impose a sentence less severe than life imprisonment. Pet. App. A13-A17. The court rejected petitioner's argument that the instructions could lead a reasonable juror to believe that the court would automatically have imposed a sentence of less than life imprisonment in the event of jury deadlock:

> Reading the instructions in their entirety, the court clearly stated that the jury must reach a unanimous verdict. At no time were the jurors ever informed that the failure to reach a unanimous verdict would result in the imposition of a term less than life imprisonment. As such, we hold that the district court did not abuse its discretion by failing to repeat the unanimity requirement [each time the court mentioned the lesser sentence option in the instructions].

Pet. App. A15.

The court also rejected petitioner's argument that "the disparity of the verdict forms," which had to be signed by all 12 jurors in the event of a death or life imprisonment recommendation but only by the foreperson in the event of a lesser recommendation, amounted to plain error. Pet. App. A15. The court explained that, "[a]lthough the verdict forms standing alone could have persuaded a jury to conclude that unanimity was not required for the lesser sentence option, any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction." Ibid. Finally, the court rejected, as precluded by Federal Rule of Evidence 606(b) and federal case law, petitioner's proffer of juror affidavits in an attempt to show that jurors in fact were confused by the instructions. Pet. App. A16-A17.

The court also rejected petitioner's related claim that the trial court committed plain error by allowing the jury three options -- death, life imprisonment without release, and some other lesser sentence. Pet. App. A17-A19. After examining "the disparate sentencing options provided for" in the Federal Death Penalty Act, 18 U.S.C. 3593(e), which provides all three possibilities, and the Federal Kidnapping statute, which provides

only for death or life imprisonment, the court concluded that "the substantive criminal statute [i.e., the kidnapping statute] takes precedence over the death penalty sentencing provisions." Pet. App. A19. The court also found, given that parole and early good time release for life offenders have been abolished in the federal system, "no meaningful distinction exists between 'life' [as mandated by the kidnapping statute] and 'life without the possibility of release.'" Ibid. Although the court held that "the district court committed error by informing the jury of the lesser sentence option available under § 3593," the court declined to find that the mistake constituted plain error that would require reversal even in the absence of a timely objection. Ibid.

The court next rejected petitioner's challenges to the two statutory aggravating factors found by the jury -- that petitioner caused the death during commission of kidnapping, another crime, and that petitioner committed the offense in an especially heinous, cruel and depraved manner that involved torture and serious physical abuse. Pet. App. A19-A22. In contrast, the court held that the two non-statutory aggravating factors found by the jury -- the victim's "young age, her slight stature, her background, and her unfamiliarity with San Angelo, Texas"; and her "personal characteristics and the effect of the offense on her family" -- were invalid, both because they were "duplicative" of each other and because they were "vague and overbroad." Id. at A22-A23.

Although the court held that the non-statutory aggravating factors found by the jury were not valid, the court concluded that

the jury's consideration of those factors was harmless beyond a reasonable doubt. Pet. App. A23-A25. The court explained that, "[u]nder a weighing statute [such as the Federal Death Penalty Act], affirming a death sentence when an aggravating factor has been found invalid requires the appellate court to scrutinize the role which the invalid aggravating factor played in the sentencing process in order to comply with the Eighth Amendment requirement of individualized sentencing determinations in death penalty cases." Id. at A23-A24. After detailing the possible methods of appellate analysis, the court decided to "redact the invalid aggravating factors" (id. at A25) and "inquire into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factors" (id. at A24). The court found that, "[a]t the sentencing hearing, the government placed great emphasis on the two statutory aggravating factors found unanimously by the jury," whereas "jury findings regarding the nonstatutory aggravating factors were not required before the jury could recommend the death penalty." Id. at A25. The court concluded that the erroneous non-statutory aggravating factors were "harmless because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." Ibid.

ARGUMENT

The court of appeals correctly affirmed petitioner's death sentence in an opinion that creates no conflict with any other decision. None of the four questions and various "subsidiary

questions" (Pet. i-ii) presented by the petition warrants this Court's review.

1. Petitioner claims (Pet. 10-17) that the district court was legally required to instruct the jury that the jury's failure to agree on a unanimous sentencing recommendation would require the court to impose a sentence of life imprisonment without possibility of release. Petitioner also requested an instruction that, if any juror was not persuaded that death was the appropriate sentence, the jury "must return a decision against capital punishment and must fix [petitioner's] punishment at life in prison without the possibility of release." Pet. App. A13 n.8. The court of appeals correctly explained, however, that the instructions proposed by petitioner did not accurately state the law and, in any event, were not required. Id. at A12-A13, A16.

a. Petitioner's proposed instructions were legally erroneous, because the Federal Death Penalty Act requires jury unanimity for any sentencing recommendation. See 18 U.S.C. 3593(e) ("jury by unanimous vote * * * shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or [to] some other lesser sentence"). By the plain terms of the statute, therefore, there can be no jury sentencing decision without unanimous agreement. The legal theory underlying petitioner's proposed instructions -- that "Unanimity [is] Required Only for [a] Death Sentence [Recommendation]" (Pet. App. A13 n.8) -- thus contravenes the plain statutory language.

Petitioner's contention that there can be no retrial following a hung jury is also not supported by the statutory language. To the contrary, the statute suggests that a jury that deadlocks on the sentencing recommendation should be dismissed and a new jury impaneled to recommend the sentence. Section 3593(b)(1) of Title 18 of the United States Code provides that the penalty phase hearing ordinarily should be conducted "before the jury that determined the defendant's guilt," but 18 U.S.C. 3593(b)(2) permits the penalty phase to be conducted "before a jury impaneled for the purpose of the hearing if * * * the jury that determined the defendant's guilt was discharged for good cause." The phrase "discharged for good cause," read naturally, encompasses the discharge of the guilt phase jury because it has been unable to agree on a unanimous sentencing decision.

The statute's failure to authorize in express language resentencing following a hung jury is not surprising. Although no federal statute or procedural rule expressly allows retrial following a hung jury on a substantive criminal charge, it has long been the rule that the government is entitled to retry a case to a new jury if the first jury is discharged based on its inability to reach a verdict. See United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824). See also Richardson v. United States, 468 U.S. 317, 325 (1984) ("a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments").

Contrary to petitioner's argument (Pet. 13), his interpretation is not compelled by the second sentence of 18 U.S.C. 3594. That Section provides:

> Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

18 U.S.C. 3594 (emphasis added). Read in the context of the preceding sentence and the statute as a whole, the underlined sentence means that, if the jury, in accordance with Section 3593(e), unanimously recommends "some other lesser sentence," 18 U.S.C. 3593(e), rather than death or life in prison, the court may impose "any lesser sentence that is authorized by law," 18 U.S.C. 3594. In other words, if the jury unanimously recommends death or life in prison, the judge must impose the recommended sentence. If the jury unanimously recommends less severe punishment, the court, not the jury, fixes the actual terms of that punishment.

Petitioner contends that the underlined sentence serves an additional purpose, beyond providing that the court (rather than the jury) shall fix the actual term of imprisonment in cases when the jury recommends punishment less severe than life in prison. In his view, the sentence also creates an unstated rule that jury deadlock requires imposition of the least severe punishment option. Petitioner's reading of the sentence is incorrect, not simply because it overlooks the background rule that retrial is generally

permitted following a hung jury, but more importantly because it fails to take account of the remainder of the statute. See Gustafson v. Alloyd Co., 513 U.S. 561, 569-570 (1995) (statute must be read as a whole).

Petitioner's default sentencing rule would nullify the requirement in Section 3593(e) that the jury unanimously recommend the sentence even if the sentence is for imprisonment for a term of years less than life. And petitioner's rule runs counter to Section 3593(b)(2)(C), which allows sentencing by a specially empaneled jury when "the jury that determined the defendant's guilt was discharged for good cause." See Bennett v. Spear, 117 S. Ct. 1154, 1167 (1997) (court should not interpret statute in a way that would "emasculate an entire section"); Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 515 U.S. 687, 698 (1995) (noting "reluctance to treat statutory terms as surplusage").

Petitioner's claim (Pet. 13) that the statute's "clear language" justifies the jury instruction he seeks is further undermined by the Louisiana case upon which he relies. See Pet. 14 (citing State v. Williams, 392 So.2d 619 (La. 1980)). As this Court has noted, "Louisiana law provides that if the jury hangs, the court shall impose a sentence of life imprisonment." Lowenfield v. Phelps, 484 U.S. 231, 238 (1988). The Louisiana provision, however, contains "clear language" requiring that result: "If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life

imprisonment without benefit or probation, parole or suspension of sentence." La. Code Crim. Proc. art. 905.8 (West 1984). Comparable language is notably absent from the Federal Death Penalty Act.[2]

b. Even if petitioner were correct that the jury's failure to agree on a sentencing recommendation requires the court to enter the least severe sentence available under the law, petitioner would not have been entitled to an instruction to that effect. This Court has held that the Constitution precludes some instructions that "improperly describe[] the role assigned to the jury by local law." See Dugger v. Adams, 489 U.S. 401, 407 (1989) (citing Caldwell v. Mississippi, 472 U.S. 320 (1985)). The Court, however, has never suggested that the Constitution requires that the jury be instructed on the consequences if it should fail to reach a

---

[2] Petitioner argues (Pet. 13-14) that the decision of the court of appeals on the effect of jury deadlock conflicts with oral comments of the district court in United States v. Nichols, 1998 WL 2518 (D. Colo. Jan. 7, 1998). Conflict with a district court decision is not a ground for certiorari. See S. Ct. Rule 10(a). In any event, there is no conflict between the decision in petitioner's case and Nichols. The court in Nichols did not give the jury deadlock instructions requested by petitioner in this case, but, to the contrary, instructed that all 12 jurors would have to sign the verdict form whether the jury recommendation was death, life imprisonment, or some other lesser sentence. See 1998 WL 1057, at **36-42 (D. Colo. Jan. 5, 1998). Furthermore, the jury in Nichols did not deadlock on the question of the appropriate sentence. The jury never addressed that question, because it deadlocked on the anterior question whether the defendant had acted with the requisite intent to kill. The district court in Nichols did comment that the jury's deadlock on that issue was, in legal effect, "the jury's choice of the third [sentencing] option, which is sentencing by the Court." 1998 WL 2518, at *4. That comment does not conflict with the court of appeals' ruling in this case that petitioner was not entitled to the instructions he requested on the consequences of jury deadlock.

unanimous verdict. To the contrary, the Court has noted that, even when jury deadlock returns the matter to the judge for sentencing, "[t]he State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" Lowenfield, 484 U.S. at 238 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)). Petitioner's proposed instruction would undermine that strong interest by discouraging deliberations to achieve jury unanimity.

For that reason, the federal courts have rejected arguments that the Constitution requires a jury instruction on the consequences of jury deadlock, even when the governing statute prescribes that deadlock shall result in judicial sentencing. See, e.g., United States v. Chandler, 996 F.2d 1073, 1088-1089 (11th Cir. 1993) (Title 21 federal death penalty case), cert. denied, 512 U.S. 1227 (1994); Evans v. Thompson, 881 F.2d 117, 123-124 (4th Cir. 1989) (habeas case), cert. denied, 497 U.S. 1010 (1990).[3]

---

[3] Petitioner correctly notes (Pet. 15-16) that some state courts have held or suggested that the jury in a capital case should be informed when its failure to achieve unanimity will result in a court-imposed sentence other than death. Some of those cases turn on rules of state practice and do not purport to articulate a rule of federal constitutional law. See Turner v. Calderon, 970 F. Supp. 781, 796-797 (E.D. Cal. 1997). To the extent that others rest on interpretations of the federal Constitution, see, e.g., State v. Williams, 392 So.2d 619 (La. 1980), they do not conflict with the decision of the court of appeals in this case, which, as petitioner acknowledges (Pet. 14), turned on the court's conclusion that a failure to achieve unanimity would result in a second jury sentencing proceeding rather than a court-imposed sentence. See Pet. App. A13; see also id. at A16 (distinguishing Williams on that basis).

2. a. Petitioner next raises the fact-bound claim (Pet. 17-25) that the jury instructions and verdict forms improperly led the jury to believe that jury deadlock on the penalty automatically would result in a court-imposed sentence less than life imprisonment. The court of appeals correctly rejected that contention, see Pet. App. A13-A15, which is unworthy of this Court's review in any event.

This Court, in death and non-death cases alike, applies the "well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Boyde v. California, 494 U.S. 370, 378 (1990) (internal quotation marks omitted). A defendant challenging ambiguous jury instructions on appeal must demonstrate "a reasonable likelihood that the jury has applied the challenged instruction[s]" in a legally erroneous and prejudicial way. Id. at 380. Petitioner's burden is even heavier here because he did not timely raise his objection in the district court. He therefore must show: "(1) 'error' (2) that is 'plain,' and (3) that 'affect[s] substantial rights'" and that "(4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" Johnson v. United States, 117 S. Ct. 1544, 1549 (1997) (quoting cases).

The court of appeals properly applied that standard to the facts of petitioner's case. As the court of appeals explained, nothing in the jury instructions stated that petitioner would receive a sentence less than life imprisonment in the event of jury

deadlock. See Pet. App. A15. To the contrary, the district court instructed, consistent with the statute, that jury unanimity was required for each of the three sentencing options. See Pet. App. A14 (quoting instruction that: "you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence").

Petitioner nonetheless claims that jurors were reasonably likely to misconstrue the instruction because the district court did not repeat the requirement that the jury's recommendation be unanimous each time that the court described the option of a sentence less severe than death or life imprisonment. Petitioner also argues that the verdict form for the lesser offense option required only the jury foreperson's signature rather than the signature of each juror. Acknowledging that, viewed in isolation, aspects of the instructions and the verdict forms might have raised some ambiguity, the court of appeals concluded, based on its "[r]eading [of] the instructions in their entirety," that there was no reasonable likelihood that the jury was confused about the consequences if it failed to make a unanimous recommendation. Pet. App. A15; see also ibid. ("any confusion created by the verdict forms was clarified when considered in light of the entire jury instruction"). Petitioner offers no reason for this Court to review the fact-specific judgment of the court of appeals.

The court of appeals' reliance on the jury instructions as a whole to cure any ambiguity in the verdict forms comports with "the

almost invariable assumption of the law that jurors follow their instructions." Richardson v. Marsh, 481 U.S. 200, 206 (1987), quoted and applied in Shannon v. United States, 512 U.S. 573, 585 (1994). Here, the court instructed the jury: "In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release." Pet. App. A15. The jury is presumed to have followed that instruction. Cf. Shannon, 512 U.S. at 585 (jury presumed to have followed instruction not to consider consequences of finding defendant not guilty by reason of insanity). The court of appeals correctly rejected petitioner's submission of juror affidavits to rebut that presumption. See Pet. App. A16-A17. And, although petitioner continues to rely on those affidavits in this Court (Pet. 22), he does not challenge the court of appeals' ruling that the affidavits may not be considered.

b. The court of appeals did hold that, in light of the federal kidnapping statute's limitation of possible penalties to death and life imprisonment, the trial court should not have offered the jury a third option of imposing "some other lesser sentence." See Pet. App. A19. Petitioner, however, did not object to the inclusion of the third option. The court's reference to it therefore does not support reversal of petitioner's sentence unless he can establish that it prejudiced him and that it seriously affected the fairness, integrity, or public reputation of the proceedings, thus warranting discretionary relief. See Johnson,

117 S. Ct. at 1549-1550. Petitioner cannot show that the jury's mere consideration of an additional sentencing option meets those tests.

This case bears no resemblance to Hicks v. Oklahoma, 447 U.S. 343 (1980), in which the jury's sentencing options were improperly constricted, rather than expanded. In Hicks, the jury erroneously was told that a 40-year prison sentence was mandatory when in fact the law actually allowed any sentence of at least ten years' imprisonment. Under those circumstances, this Court concluded that the defendant was prejudiced by the erroneous instruction, which prevented the jury's consideration of sentences of fewer than 40 years. See id. at 346. Here, in contrast to Hicks, petitioner cannot show any harm from the submission of an extra sentencing option that the jury chose not to recommend.

3. Petitioner next challenges (Pet. 25-36) the determination of the court of appeals, based on the particular facts of petitioner's case, that the jury's consideration of two invalid, non-statutory aggravating factors was harmless beyond a reasonable doubt. The court of appeals, however, properly applied harmless error analysis under this Court's precedents and the governing statute.

The court of appeals correctly recognized that the Constitution permits two options to an appellate court that has invalidated an aggravating factor found by a jury: The appellate court may itself "reweigh" the valid aggravating and mitigating factors, or it may conduct harmless error review. See Pet. App.

A23-A24 (discussing Clemons v. Mississippi, 494 U.S. 738 (1990), and Stringer v. Black, 503 U.S. 222 (1992)). The court also properly determined that harmless error analysis may be conducted in two ways -- either by "inquir[ing] into whether, beyond a reasonable doubt, the death sentence would have been imposed had the invalid aggravating factor been properly defined in the jury instructions" or by "inquir[ing] into whether, beyond a reasonable doubt, the death sentence would have been imposed absent the invalid aggravating factor." Pet. App. A24 (citing Clemons and Fifth Circuit case law). The court chose the second form of harmless error review. Ibid. It concluded that "the error was harmless because the death sentence would have been imposed beyond a reasonable doubt had the invalid aggravating factors never been submitted to the jury." Pet. App. A25.

The application of harmless error review was not only sanctioned by this Court's precedents but was, in fact, required by federal statute. See 18 U.S.C. 3595(c) ("The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless.").

Petitioner, however, attacks the harmless error methodology employed by the court, claiming (Pet. 31) that the court "appeared to hold that because there were two valid aggravating factors [remaining], the sentence itself was necessarily valid." Contrary to petitioner's claim, the court explicitly recognized that a "rule

automatically affirming a death sentence in a weighing scheme as long as one aggravating factor remained would violate the requirement of individualized sentencing." Pet. App. A24 (citing Clemons).

Petitioner also errs in claiming (Pet. 30) that "the court neither 'made a detailed explanation based upon the record,' nor offered 'a principled explanation for how the court reached [its] conclusion.'" The court of appeals set forth its harmless error methodology in detail and then explained why, applying that methodology, it concluded beyond a reasonable doubt that the jury's consideration of the invalid aggravating factors was harmless. See Pet. App. A23-A25. The court correctly noted that the non-statutory aggravating factors (unlike the statutory factors) were not necessary for the jury to impose the death sentence and that, "[a]t the sentencing hearing, the government placed great emphasis on the two statutory factors found unanimously by the jury." Pet. App. A25. Contrary to petitioner's claim that the court "fail[ed] to even mention the mitigating factors" (Pet. 31), the court reached its holding "even after considering the eleven mitigating factors found by one or more jurors." Pet. App. A25; see also id. at A8 n.3 (listing all mitigating factors and the number of jurors who found each of them). Petitioner's case thus bears no resemblance to Clemons, 494 U.S. at 753 (court made a "cryptic," one sentence conclusion of harmless error), or Sochor v. Florida, 504 U.S. 527, 540 (1992) (court "did not explain or even 'declare

a belief that' th[e] error was harmless beyond a reasonable doubt").

Petitioner also makes a fact-bound challenge to the harmless error finding. That challenge lacks merit. As petitioner explains, one reason that the court of appeals concluded that consideration of the non-statutory factors was erroneous was that the court believed they "were duplicative and overlapping" and were thus "weighed twice" (Pet. 35 (emphasis in original)). The likelihood that flaw affected the verdict is remote at best because the jury was instructed that the weighing process "is not a mechanical" one and that the jury "should not simply count the number of aggravating and mitigating factors and reach a decision on which number is greater" but "should consider the weight and value of each factor." Pet. App. F15. Another reason for the court's conclusion that the non-statutory factors should not have been considered was that they were "vague and overbroad." Pet. 28; Pet. App. A23. The likelihood that flaw affected the verdict is also small. The factors reflected two proper sentencing considerations: the vulnerability of the victim and the impact of her death on her family. See Pet. App. A22-A23 (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991), and Twilaepa v. California, 512 U.S. 967, 977 (1994)). One of those considerations, the victim's vulnerability, was encompassed by one of the valid statutory factors. See Pet. App. A22 n.12 (listing "helplessness of the victim" as one of the "[p]ertinent factors" in considering whether killing was especially heinous, cruel or depraved).

Petitioner does not contend that the unartfully drafted non-statutory factors allowed the admission of evidence that was not otherwise properly before the jury. More important, the court of appeals found that "the government placed great emphasis on the two statutory factors" at the sentencing hearing. There is therefore no basis for this Court to review the court of appeals' harmless error finding.

4. Petitioner finally claims (Pet. 36-39) that the court of appeals violated two "procedural" requirements imposed by the death penalty statute -- (1) that the court "address all substantive and procedural issues raised on the appeal of a sentence of death," 18 U.S.C. 3595(c)(1)), and (2) that it "state in writing the reasons for its disposition of an appeal of a sentence of death," 18 U.S.C. 3595(c)(3). Petitioner suggests (Pet. 37) that the court violated those requirements because he "filed an appellate brief with 18 issues, many of which had various subparts," but "the Court of Appeals in its written opinion specifically addressed only four issues."

The court of appeals "address[ed]" -- i.e., it considered and disposed of -- all of the issues raised by petitioner's appeal. See Pet. App. A6 ("After considering all the issues raised by the defendant on appeal, we affirm both the conviction and the sentence of death"); id. at A25 (affirming conviction and sentence "[a]fter considering the eighteen issues raised by [petitioner] on appeal"). The court also "state[d] in writing the reasons for its disposition of the appeal," 18 U.S.C. 3595(c)(3): The court concluded that

"the sentencing provisions of the Federal Death Penalty Act are constitutional and that [petitioner's] death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor." Pet. App. A25.

Petitioner's claim of a violation of the statute collapses two separate statutory requirements -- that the court (1) address all issues and (2) state in writing its reasons for disposing of the case -- and thereby posits a requirement that "each issue raised by a death-sentenced individual be individually and specifically addressed in the written opinion of the Court of Appeals" (Pet. 36). The statute is not phrased in the language that petitioner uses, and it does not impose the requirement that he would impose.

The court of appeals thus provided petitioner the appellate review to which the statute entitled him. Even assuming there were some procedural violation, however, petitioner has not shown that it prejudiced him in a manner that warrants this Court's review. Petitioner asserts (Pet. 37) that a purpose of the purported "'full opinion' requirement of § 3595(c)(1) and (c)(3) was to facilitate this Court's review of death sentences." Each of the claims petitioner raises in this Court, however, was discussed and resolved in writing by the court of appeals. The only claims that petitioner argues were not disposed of by "full opinion" are claims that he has chosen not to renew here. A remand to the court of appeals requiring it to discuss those claims in writing would thus not advance the purpose for which petitioner would have this Court impose the requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

SEAN CONNELLY
Attorney

JULY 1998

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JONES, LOUIS (CAPITAL CASE)
Petitioner

vs.

USA

No. 97-9361

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 31st day of July 1998.

TIMOTHY CROOKS
ASSISTANT FEDERAL PUBLIC DEFENDER
600 TEXAS STREET
SUITE 100
FT. WORTH, TX 76102-4612

TIMOTHY W. FLOYD
TEXAS TECH UNIVERSITY SCHOOL OF LAW
18TH & HARTFORD
LUBBOCK, TX 79409

Seth P. Waxman/cs

SETH P. WAXMAN
Solicitor General
Counsel of Record

July 31, 1998